



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.01.2022

CORAM

THE HONOURABLE MS.JUSTICE P.T.ASHA

C.R.P(MD)No.1803 of 2014

and

M.P(MD) No.1 of 2014

1.Babu
2.Agnus

... Petitioners/ Petitioners/
Defendants 1&3

Vs.

1.Soman
2.Glory

... Respondents/Respondents/
Plaintiff & 2nd Defendant

PRAYER:- Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, to set aside the order and decreetal order in I.A.No.138 of 2013 in O.S.No.92 of 2009 dated 11.04.2014 on the file of the 1st Additional District Munsif's Court at Kuzhithurai.

For Petitioner : Mr.K.Sree Kumaran Nair

For R-1 : Mr.M.Punitha Devakumar

For R-2 : No appearance

ORDER

Aggrieved by the dismissal of their application to condone the delay of 124 days in filing the application to set aside the ex parte decree, the defendants 1 and 3 are before this Court.

2.The facts in brief are as follows:-

(i) The first respondent had filed O.S.No.92 of 2009 on the file of the District Munsif, Kuzhithurai, for partition and separate possession of his 1/3rd share in the suit schedule property. The case of the plaintiff is that his father Muthaian had owned 20 cents of land in R.S.No.179/13 and old survey No.4643 of Muthukkummal Village in which the plaintiff has a 1/3rd share after the death of his father as he had died intestate. It is his case that despite his request, the defendants had not come forward to partition the property and therefore, the plaintiff has come forward with the above suit. The defendants 1 and 2 and the plaintiff are the sons of the Muthaian and the third defendant is his wife. It appears



that an *ex parte* decree came to be passed on 09.06.2009.

(ii) The defendants 1 and 3 had thereafter come forward with the impugned application stating that the summons had been manipulated as if it had been returned by them and without taking further summons or substituted summons, the suit came to be decreed *ex parte*. The first defendant had sworn to the affidavit for and on behalf of the other defendants. He would submit that they had come to know about the *ex parte* decree only on 31.08.2012, when the final decree notice had been served on them. Immediately, he had approached his advocate and filed a vakalat. Thereafter since he had undergone a paralytic attack, he was not able to meet his counsel and he was also hospitalized for treatment for the period from 02.09.2012 to 18.01.2013. As a result, the delay of 124 days had occurred. He had further stated that the plaintiff is not the son of Muthaian, but was the son of Sundaram, the first husband of the third defendant and therefore, he was not entitled to any share in the suit schedule property. Along with petition, a written statement was also filed.

(iii) The first respondent/plaintiff had filed a counter in which he had not touched upon the defence of the petitioners that the plaintiff was not the son of Muthaian. Despite the above substantial defence, the learned Judge had refused to condone the delay on the ground that the summon was refused by the petitioners and not manipulated as stated by the petitioners. Challenging the said order, the revision petitioners are before this Court.

3.The respondents have not appeared before the Court on all the occasions and even to day when the matter has been listed there is no representation. Therefore, the Court is proceeded to hear the revision petitioners and pass orders. Heard the learned counsel appearing on behalf of the revision petitioners and perused the records.

4.The revision petitioners have taken a substantial defence that the plaintiff is not the son of Muthaian and therefore, he is not entitled to a share. This statement has not been refuted in the counter filed by the plaintiff to the petition for condonation of delay. The learned District Munsif has totally overlooked the above fact and that apart, the case of the revision petitioners is that the plaintiff has manipulated the summon as if it has been refused by the defendants, when the summons had not been received by them or served on them. They have taken out a defense that the summon was not served on them. Considering the substantial defence, the learned Judge ought to have allowed the application, particularly, when sufficient reasons had been given.

5.Therefore, this Civil Revision Petition is allowed and the order dated 11.04.2014 passed in I.A.No.138 of 2013 is set aside. The learned District Munsif, Kuzhithurai shall also



set aside the *ex parte* order as and when the petition moved by the petitioners, taking into account the defence taken by them. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (AE)

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// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:-

The 1st Additional District Munsif
Kuzhithurai.

Copy to:
The Section Officer, V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+1 CC to M/s.K.SREE KUMARAN NAIR, Advocate (SR-1654[F] dated 19/01/2022)

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